THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN

WRIT PETITION No.22960 of 1996

Dated: 05.02.2007

Between:

Mohd. Hayath Khan S/o Ismail Khan (died)
and others.

..... PETITIONERS

AND

Industrial Tribunal No.1, Chandravihar Complex,
Exhibition Grunds, Nampally, Hyderabad and another.

.....RESPONDENTS

THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN

WRIT PETITION No.22960 of 1996

ORDER:

Seeking to have the Award in I.D.No.20 of 1993 dated 03.04.1996 before the Industrial Tribunal No.I, Hyderabad, quashed, the petitioner/workman approached this Court. During the pendency of the writ petition, the petitioner died and his legal representatives were brought on record as petitioners 2 to 6.

On a reference by the Government of India, in its proceedings dated 04.05.1993, the following dispute was referred to the Industrial Tribunal for adjudication.

> "Whether the action of the management of State Bank of India in terminating the services of Sri Mohammed Hayath Khan with effect from 28.12.1971 is legal and justified? If not, to what relief the workman is entitled to?"

Both the petitioner herein and the second respondent adduced evidence before the Tribunal. While the petitioner examined himself as W.W.1 and another witness as W.W.2, Sri T.Narendra Prasad was examined on behalf of the second respondent as M.W.1. Petitioner marked Exs.W.1 to W.11, whereas the second respondent marked Exs.M1 and M2.

The Tribunal held that the engagement of the petitioner was oral and his termination was also oral, that he was engaged temporarily to watch the godowns of M/s Gowtham Rolling Mills, which was financed by the second respondent, that the petitioner was disengaged as a watchman as the need to watch the godowns of M/s.Gowtham Rolling Mills ceased to exist and that the petitioner was not employed in a regular post as a regular employee by the second respondent Bank, that he was engaged as a watchman temporarily to meet the exigencies of the second respondent Bank and since the second respondent Bank had granted a loan to M/s.Gowtham Rolling Mills, the petitioner was engaged as a watchman intermittently during 1971 to safeguard the machinery and other stocks in the premises of M/s.Gowtham Rolling Mills. The Tribunal held that the petitioner was not continued in service since the necessity to safeguard the godowns of M/s.Gowtham Rolling Mills ceased to exist and as there was no work to be entrusted to the petitioner beyond that period and that, in such circumstances, the engagement or appointment of the petitioner as a watchman could not be equated to a regular appointment so as to enable him to claim reinstatement. The Tribunal held that the petitioner was disengaged as there was no work to be entrusted to him, that it could not be said that his discharge was motivated by vindictiveness or unfair labour practice on the part of the second respondent Bank, and that the petitioner was

disengaged for want of work. The Tribunal held that termination/discharge of the petitioner did not amount to retrenchment under Section 2(oo) of the Industrial Disputes Act, 1947 (for short "the Act"). The Tribunal held that, in the absence of a clear regular vacancy, the petitioner could not have been continued in service as a regular employee and his discharge was discharge simpliciter and did not amount to retrenchment under Section 2(oo) of the Act, and therefore, the second respondent Bank was not required to comply with Section 25-F of the Act for disengaging the services of the petitioner. The Tribunal held that there was no discrimination since other persons, with whom the petitioner sought to compare his case with, had all been appointed as full time watchmen.

On the question of laches, the Tribunal held that though the petitioner was disengaged from service in December, 1971, he had kept quiet till September 1977, for a period of almost six years and even after his claim was rejected under Ex.W.4 dated 13.06.1978, the petitioner had chosen to remain silent upto March, 1984 for another six years before he chose to make another representation to the second respondent Bank. The Tribunal noted that the petitioner did not agitate his case at any point of time till September 1986 when he raised the industrial dispute and that no documents had been filed to show that the petitioner had pursued his case between 1971 and 1977 and subsequently between 1978 and 1984. The Tribunal held that, since the claim was highly belated and stale, no relief can be granted to the workman, that there was abnormal delay on the part of the petitioner in agitating his claim for reinstatement, that the petitioner had slept over from 1971 to

1984, that he had also not explained the delay, that his claim had become stale, and there was no substance in his contention that discrimination had been meted out to him. The Tribunal concluded that the action of the management in terminating the petitioner/workman did not amount to retrenchment and was justified, and in view thereof, the petitioner/workman was not entitled for any relief.

Sri V.Srinivas, learned counsel for the petitioner/workman, submits that since the definition of "workman" under Section 2(s) of the Act means any person, (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work, for hire or reward, whether the terms of employment be express or implied, it is only those persons who are specifically excluded under categories 1 to 4 thereunder, who are excluded from the definition of a workman under Section 2(s) of the Act, and the mere fact that the petitioner was engaged temporarily, and not on a regular basis, would not exclude him from the definition of "workman" under Section 2(s) of the Act. Learned counsel would submit that, since the petitioner falls within the definition of Section 2(s) of the Act and has admittedly put in more than 240 days of service in the 12 month period prior to his termination, he is entitled for protection under Section 25-F of the Act, and, as his services were retrenched without complying with the conditions stipulated therein, termination of his services was ab-initio void and illegal. Learned counsel would place reliance on ***Gurumail Singh v. Principal, Government College of Education*** [1], ***Ajaib Singh Vs. Srihind Cooperative Marketing-cum-processing service society limited*** [2], ***Sher***

Bahadur v. Union of India [3] ***and Sapan, and Sapan Kumar Pandit v. U.P. State Electricity Board*** [4] .

Dr.Y.Padmavathi learned counsel appearing on behalf of the second respondent Bank, would contend that, since the petitioner was not a regular employee and was engaged temporarily to discharge the functions of a watchman at the godowns of a loanee of the second respondent Bank, he was well aware that his services were being utilized for a short duration and termination of the services of such an employee would fall within the exception clause (bb) of Section 2(oo) of the Act, and termination of services of such an employee, as has been rightly held by the Tribunal, was merely a case of discharge simpliciter and did not amount to retrenchment. Learned counsel would further submit that the inordinate delay in approaching the Tribunal would disentitle the workman from being granted any relief and that the Tribunal had rightly dismissed the Industrial Dispute raised in this regard holding that the petitioner/workman was not entitled for any relief. Learned counsel would place reliance on ***S.M.Nilajkar v. Telecom District Manager, Karnataka*** [5] ***, U.P.State Road Transport Corporation v. Babu Ram*** [6] ***, Assistant Engineer, Cad Kota, v. Dhan Kunwar*** [7] ***, Vishwas Bhimrao Dhumal v. Kopargaon Nagarpalika*** [8] ***and Nedungadi Bank Ltd., v. K.P.Madhavankutty*** [9] ***.***

Before examining the rival contentions on the question of laches, the contention of Dr.Y.Padmavathi, learned counsel for the second respondent, that termination of services of the

petitioner does not amount to retrenchment under Section 2(oo) (bb) of the Act must be examined. In ***S.M.Nilajkar*** [5], the Supreme Court observed:-

> "..... The termination of service of a workman engaged in a scheme or project may not amount to retrenchment within the meaning of sub-clause (bb) subject to the following conditions being satisfied:
>
> (i) that the workman was employed in a project or scheme of temporary duration;
>
> (ii) the employment was on a contract, and not as a daily-wager simpliciter, which provided inter alia that the employment shall come to an end on the expiry of the scheme or project;
>
> (iii) the employment came to an end simultaneously with the termination of the scheme or project and consistently with the terms of the contract; and
>
> (iv) the workman ought to have been apprised or made aware of the above said terms by the employer at the commencement of the employment.
>
> The engagement of a workman as a daily-wager does not by itself amount to putting the workman on notice that he was being engaged in a scheme or project which was to last only for a particular length of time or up to the occurrence of some event, and therefore, the workman ought to know that his employment was short-lived. The contract of employment consciously entered into by the workman with the employer would result in a notice to the workman on the date of the commencement of the employment itself that his employment was short-lived and as per the terms of the contract the same was liable to termination on the expiry of the contract and the scheme or project coming to an end. The workman may not therefore complain that by the act of the employer his employment was coming to an abrupt termination. To exclude the termination of a scheme or project employee from the definition of retrenchment it is for the employer to prove the above said ingredients so as to attract the applicability of sub-clause (bb) above said. In the case at hand, the respondent employer has failed in alleging and proving the ingredients of sub-clause (bb), as stated hereinabove. All that has been proved is that the appellants were engaged as casual workers or daily-wagers in a project. For want of proof attracting applicability of

sub-clause (bb), it has to be held that the termination of the services of the appellants amounted to retrenchment."

Clause (bb) of Section 2(oo) of the Act excludes certain contingencies from the definition of retrenchment, when (1) Termination of the services of a workman is as a result of non-renewal of the contract of employment between the employer and the workman concerned on its expiry or (2) of such contract being terminated under a stipulation in that behalf contained therein.

The second limb of clause (bb) of Section 2(oo) of the Act is not attracted since termination of services of the petitioner is admittedly not under any stipulation contained in the contract of employment, as both the contract of engagement and termination were admittedly oral. The question which arises for consideration is whether it would fall under the first limb of Clause (bb) of sub-Section (oo) of Section 2 of the Act. As held in ***S.M.Nilajkar***[5] termination of the services of a workman would fall under the first limb of clause (bb) of Section 2(oo) of the Act, provided the following conditions are satisfied:

(1) That the workman was employed for a temporary ıration;

(2) That the employment was on contract, and not on daily wages, and the contract provided that the employment shall come to an end on expiry of the period;

(3) That the employment came to an end consistent with e terms

of the contract; and

(4) The workman ought to have been apprised or made vare of

the above said terms by the employer at the ›mmencement of

the employment.

The engagement of a workman as a daily wager does not by itself amount to putting the workman on notice that he was being engaged only for a particular length of time or upto the occurrence of some event. It is only when a contract of employment for a specified period is consciously entered into by the workman, with the employer, would it result in a notice to the workman on the date of commencement of the employment itself that his employment was short-lived and as per the terms of such contract he is liable to be terminated on expiry of the period.

None of these conditions are fulfilled in the present case. It is not even the case of the second respondent that the petitioner was specifically made aware at the time of his initial engagement that his services were being engaged only for a specified duration. There is nothing on record to show that on expiry of period prescribed in such a contract of employment, the contract was not renewed.

The first limb of clause (bb) of Section 2(oo) of the Act is also not attracted and as such the petitioner's case does not fall within the exceptions under clause (bb) of section 2(oo) of the Act and termination of his services would undoubtedly amount to retrenchment entitling him for protection under Section 25-F of the Act. The Tribunal had erred in holding that, since he was not appointed as a regular employee and was engaged on a temporary basis, termination of the petitioner's services as a watchman at the godowns of a loanee of the

second respondent Bank amounted to discharge simpliciter, and did not amount to retrenchment. The finding of the Tribunal, in this regard, is contrary to law and are accordingly set aside.

Reliance placed by Dr.Y.Padmavathi on the judgment of a Division Bench of the Bombay Court in ***Vishwas Bhimrao Dhumal***[8] is also misplaced. In the said case, a Division Bench of Bombay High Court observed:-

> " ..... The Labour Court was required to examine whether the order of reinstatement should be granted because of breach of Ss.25F and 25G of the Act. There is no mandatory rule that as soon as there is a breach of the requirement, the Court shall direct reinstatement. The Court can decline to grant that relief, in case, it is found that the employee is unable to carry out or discharge the duties of the post. In the present case, the post could be occupied only by the person who is duly qualified, that is holding a certificate of Second Class Wireman Course (I.T.I.) and duly selected by the State Selection Board. The Labour Court noticed that it is not clear that the certificate held by the petitioner satisfied the required qualification. Apart from that aspect, the Labour Court was impressed by the fact that the petitioner was not selected by the State Selection Board and indeed the petitioner never applied to the State Selection Board for selection....."

All that was laid down in the aforesaid judgment is that for mere breach of Section 25-F of the Act, reinstatement cannot be permitted as a matter of course, that the Court would decline to grant the relief of reinstatement if it found that the employee was unable to carry out or discharge the duties of the post, and that compensation in lieu of reinstatement could be granted.

The very fact that the petitioner discharged the duties of a watchman at the godown of M/s Gouwthan Rolling Mills Limited temporarily would itself show that he was capable of discharging those duties. The submission is that for appointment, to a regular post of watchman, the qualifications

prescribed by the second respondent is a pass in the VIII class and that the candidate should not be more than 26 years and, since the petitioner did not satisfy these requirements, he was not entitled for reinstatement to the regular post of watchman. The distinction between reinstatement consequent upon non-compliance with the mandatory requirement of Section 25-F of the Act and regularization of services of an employee must not be lost sight of. For violation of the mandatory provisions of section 25-F of the Act, even in cases where the Labour Court/Industrial Tribunal directs reinstatement, the workman is entitled to be reinstated only to the post which he held prior to his termination and not for regularization of his services. It is no doubt true that in appropriate cases the Labour Court, even if it finds that there has been violation of the provisions of Section 25-F of the Act, can direct payment of compensation in lieu of reinstatement. This question is academic at this stage, since the Tribunal has held in favour of the second respondent, and against the petitioner, and had passed an award dismissing the reference holding that since termination of the services of the petitioner was discharge simpliciter, the provisions of Section 25-F of the Act were not attracted.

On the question of laches and inordinate delay, the judgments cited across the bar are required to be taken note of.

In ***Ajaib Singh***[2], the Supreme Court observed :-

> "..... In the instant case, the respondent-management is not shown to have taken any plea regarding delay as is evident from the issues framed by the Labour Court. The only plea raised in defence was that the Labour Court had no jurisdiction to adjudicate the reference and the termination of the services of the workman was justified. Had this plea been raised, the workman would have been in a position to show the circumstances preventing him in

approaching the Court at an earlier stage or even to satisfy the Court that such a plea was not sustainable after the reference was made by the Government. The learned Judges of the High Court, therefore, were not justified in holding that the workman had not given any explanation as to why the demand notice had been issued after a long period. The findings of facts returned by the High Court in writ proceedings, even without pleadings were therefore, unjustified. The High Court was also not justified in holding that the Courts were bound to render an even handed justice by keeping balance between the two different parties. Such an approach totally ignores the aims and object and the social object sought to be achieved by the Act. Even after noticing that:

"it is true that a fight between the workman and the management is not a just between equals,"

the Courts was not justified to make them equals while returning the findings, which if allowed to prevail, would result in frustration of the purpose of the enactment. The workman appears to be justified in complaining that in the absence of any plea on behalf of the management and any evidence, regarding delay, he could not be deprived of the benefits under the Act merely on technicalities of law. The High Court appears to have substituted its opinion for the opinion of the Labour Court which was not permissible in proceedings under Arts.226/227 of the Constitution.

We are, however, of the opinion that on account of the admitted delay, the Labour Court ought to have appropriately moulded the relief by denying the appellant-workman some part of the back-wages. In the circumstances, the appeal is allowed, the impugned judgment is set aside by upholding the award of the Labour Court with modification that upon his reinstatement the appellant would be entitled to continuity of service, but back-wages to the extent of 60 per cent with effect from 8 December 1981 when he raised the demand for justice till the date of award of the Labour Court, i.e., 16 April 1986 and full back-wages thereafter till his reinstatement would be payable to him. The appellant is also held entitled to the costs of litigation assessed at Rs.5,000 to be paid by the respondent-management……"

In the aforesaid case, no plea was taken by the

management regarding delay and it was in such circumstances that the Labour Court had held that, in the absence of any plea being taken before the Labour Court, it was not open to the High Court to hold that the Award of the Labour Court was required to be set aside on the ground of laches. Having so observed, the Supreme Court held that the Labour Court ought to have moulded the relief by denying the workman some part of the back wages. The Supreme Court, while setting aside the judgment of the High Court and upholding the Award, modified the Award and held that upon his reinstatement the workman may not be entitled for continuity of service, but would be entitled only for 60 per cent of the back wages from the date when he raised the demand till the date of the award of the Labour Court.

In ***Gurumail Singh***[1]***,*** the dispute was raised by the employee eight years after his termination from service, and the Supreme Court, following its earlier judgment in ***Ajaib Singh***[2] while directing reinstatement of the workman into service, denied him back wages from the date of termination till the date when he raised the dispute and from the date when he raised the dispute till he was reinstated, the respondents therein were directed to pay the workman 50 per cent of the back wages.

In ***Sher Bahadur***[3] the Supreme Court directed compensation, at the average salary, for a period of two years to be paid to the workman in lieu of his reinstatement into service.

In ***Sapan Kumar Pandit***[4], the Supreme Court held that since no time limit was fixed for reference of a dispute for

adjudication, the Government was not entitled to refuse to refer the dispute for adjudication as long as there existed a dispute when the matter was examined by the Government and that, by mere lapse of time or inordinate delay, the power of the Government to make a reference was not extinguished. This judgment also has no application. The contention raised on behalf of the second respondent is not to the making of the reference but that no relief can be granted to the workman by a Labour Court/Industrial Tribunal on account of the inordinate delay/laches on his part in raising the dispute.

In ***S.M.Nilajkar***[5] the Supreme Court observed:-

"…….. It was submitted on behalf of the respondent that on account of delay in raising the dispute by the appellants the High Court was justified in denying relief to the appellants. We cannot agree. It is true, as held in *Shalimar Works Ltd. v. Workmen* (AIR 1959 SC 1217: (1960) 1 SCR 150) that merely because the Industrial Disputes Act does not provide for a limitation for raising the dispute, it does not mean that the dispute can be raised at any time and without regard to the delay and reasons therefor. There is no limitation prescribed for reference of disputes to an Industrial Tribunal; even so it is only reasonable that the disputes should be referred as soon as possible after they have arisen and after conciliation proceedings have failed, particularly so when disputes relate to discharge of workmen wholesale. A delay of 4 years in raising the dispute after even reemployment of most of the old workmen was held to be fatal in *Shalimar Works Ltd. v. Workmen.* In *Nedungadi Bank Ltd. v. K.P.Madhavankutty* ((2000) 2 SCC 455: 2000 SCC (L&S) 283), a delay of 7 years was held to be fatal and disentitled the workmen to any relief. In *Ratan Chandra Sammanta v. Union of India* (1993 Supp (4) SCC 67 : 1994 SCC (L&S) 182: (1994) 26 ATC 228), it was held that a casual labourer retrenched by the employer deprives himself of remedy available in law by delay itself; lapse of time results in losing the remedy and the right as well. The delay would certainly be fatal if it has resulted in material evidence relevant to adjudication being lost and rendered

> not available. However, we do not think that the delay is the case at hand has been so culpable as to disentitle the appellants to any relief. Although the High Court has opined that there was delay of 7 to 9 years in raising the dispute before the Tribunal but we find the High Court factually not correct. The employment of the appellants was terminated sometime in 1985-86 or 1986-87. Pursuant to the judgment in *Daily Rated Casual Labour v. Union of India* ((1988) 1 SCC 122: 1988 SCC (L&S) 138: (1987) 5 ATC 228) the Department was formulating a scheme to accommodate casual labourers and the appellants were justified in awaiting the outcome thereof. On 16-1-1990 they were refused to be accommodated in the Scheme. On 28-12-1990 they initiated the proceedings under the Industrial Disputes Act followed by conciliation proceedings and then the dispute was referred to the Industrial Tribunal-cum-Labour Court. We do not think that the appellants deserve to be non-suited on the ground of delay……"

While referring to its judgment in ***Shalimar Works Ltd., v Their Workmen***[10] and ***Nedungadi Bank Ltd.,***[9] , wherein the delay of four years and seven years respectively was held to be fatal if it had resulted in the material evidence, relevant to the adjudication, being lost and rendered not available, the Supreme Court upheld the order of the Single Judge of the High Court, wherein, the workman was denied back wages while directing that he be reinstated into service.

In ***Nedungadi Bank Ltd.***[9], the question which arose for consideration before the Supreme court was whether a belated dispute would justify the action of the Government in refusing to exercise its powers under Section 10 of the Act. The Supreme Court observed that since the law did not prescribe any time limit for the appropriate Government to exercise its powers under Section 10 of the Act, such a power had to be exercised reasonably and in a rational manner and that there

was no rational basis for the Central Government to exercise its powers to refer the dispute after a lapse of seven years from the time when the workman was dismissed from service. The Supreme Court observed that the question, when the dispute can be referred, would depend upon the facts and circumstances of each case and when the matter had become final it was incongruous that a reference be made under Section 10 of the Act.

The said judgment is also of no assistance to the second respondent, for it is not on the question which this Court is now called upon to examine. The question which arises for consideration is not whether the Central Government was justified in making a reference, but whether the Tribunal should have refused to grant any relief to the workman on the ground of inordinate delay or laches or whether it was required to mould the relief appropriately.

In ***Babu Ram***[6] the Supreme Court held that the workman had not placed any material to show that he had raised a dispute within a reasonable time and that he was not responsible for the delayed decision in conciliation proceedings. The Supreme Court held that it was for the workman to show that the dispute was raised within a reasonable time, that he was not responsible for the delay and that the High Court on a hypothetical, basis had erroneously assumed that the dispute may have been raised by the workman promptly but was delayed by the State Government. The matter was referred back to the High Court to consider the question of delay in seeking a reference and to decide the matter afresh in accordance with law.

In ***Dhan Kunwar***[7] the Supreme Court observed that while there was no limitation prescribed for referring the dispute to the Industrial Tribunal, even then it was reasonable that the disputes should be referred as soon as possible after they had arisen and that a delay of four years in raising the dispute, even after reemployment of most of the old workmen, was held to be fatal in ***Shalimar Works Ltd***.[10]

In ***Nedungadi Bank Limited***[9]***,*** the Supreme Court held that a delay of 7 to 9 years was inordinate and that the Labour Court should not have granted any relief.

Whether any relief should be granted to the workman, even in case the Labour Court finds that there has been violation of Section 25-F of the Act, would depend upon the facts and circumstances of each case. Several factors such as, inordinate delay in raising a dispute, whether in the interregnum the workman was employed elsewhere, the length of service, nature of appointment, whether the circumstances of the case necessitate the workman being reinstated into service, more so in view of the inordinate delay in raising a dispute are all matters for the Labour Court to examine on the facts and circumstances of each case. There is no rule of thumb that in every case where the Tribunal gives a finding that termination of service of a workman was in violation of Section 25-F of the Act, entire back wages should be awarded (***G.M. Haryana Roadways v. Rudhan Singh: 2005(5) SCC 591***). It is for the Labour Court, if it finds that the delay was inordinate or belated, to decide whether any relief should be granted to the workman or he should be refused the relief. It is also open to the Tribunal to appropriately mould the relief even in cases where the dispute has been belatedly raised. These are all

matters which the Tribunal is required to examine and not for this Court to determine in proceedings under Article 226 of the Constitution of India.

It would meet the ends of justice if the Award of the Labour Court is set aside and the matter is remanded for its adjudication in accordance with law, on the question whether any relief should be granted to the workman and, if so, the extent to which the relief should be moulded, bearing in mind the delay in raising the dispute, which admittedly is of six years each in two different spells. Since the petitioner/workman is no more, and his legal representatives are on record, it is appropriate that the Labour Court decides the matter, as expeditiously as possible, and in any event, not later than four months from the date of receipt of a copy of this order.

The writ petition is accordingly disposed of. However, in the circumstances, without costs.

05.02.2007

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[1] **2002(2) LNN 405 (Sc).**
[2] **1999(2) LLN 674 (sc)**
[3] **2002(7) SCC 142**
[4] **2001(6) scc 222**
[5] **(2003) 4 SCC 27**
[6] **(2006)5 SCC 433**

[7] **(2006) 5 SCC 481**

[8] **1988 (2) LNN 385**

[9] **(2000) 2 SCC 455**

[10] AIR 1959 SC 1217